Supreme Court, U.S.
FILED

981602 DEC 17 1998

OFFICE OF THE CLERK

No.

UNITED STATES SUPREME COURT

October Term, 1998

BRAD GOODSPEED, *Petitioner,*

-vs-

WHITMAN COUNTY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE U.S. COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Brad Goodspeed
P.O. Box 2
Pullman, WA 99163
(509) 332-7297

43pp

QUESTIONS PRESENTED

I. Whether a State Environmental Policy Act and permitting process is a protectable property interest when that Act lacks discretionary factors and a successful completion of that review provides a reasonable expectation of an issuance of a permit to operate?

II. When a provision of a State Administrative code is silent on due process in a land use decision does it allow that State, or one of its political subdivisions, the right to circumvent the constitution and violate a citizens right to due process of the Fourteenth Amendment?

III Weather the District Court can replace a jury in deciding factual issues relative to the equal protection claim?

LIST OF PARTIES

The following persons and entities participated in the case below and are petitioners here:

Brad M. Goodspeed
PacWest Premix Inc.

Respondent Whitman County was the only party in the court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

PETITION FOR WRIT OF CERTIORARI.....1

GROUNDS ON WHICH JURISDICTION IS INVOKED.....1

STATEMENT OF THE CASE.....1

ARGUMENT.....12

I. THE CONSTITUTION GUARANTEES MR. GOODSPEED'S RIGHT TO DUE PROCESS IN LAND USE DECISIONS AND HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS CLAIMS SHOULD HAVE SURVIVED SUMMARY JUDGMENT.....12

II. THE CONSTITUTION PROTECTS MR. GOODSPEED'S RIGHT TO REASONABLE, CONSISTANT, AND FAIR LAND USE DECISIONS SUCH THAT HIS EQUAL PROTECTION CLAIM SHOULD HAVE SURVIVED SUMMARY JUDGMENT.....19

CONCLUSION.....22

TABLE OF AUTHORITIES

Table of Cases

Board of Regents v. Roth,
408 U.S. 564 (1972).....12

Celotex Corp. V. Catrett,
477 U.S. 317 (1986).....16

Mathews v. Eldridge,
424 U.S. 319 (1976).....14

Wedges/Ledges of California v. City of Phoenix,
24 F.3d 56 (9th Cir. 1994).....12, 15

Statutes

Wash. Rev. Code § 43.21C et seq.....3

Regulations and Rules

Wash. Admin. Code § 197-11-340(1).....13

Wash. Admin. Code § 197-11-340(3)(a)(iii).....7, 13, 15

Wash. Admin. Code § 197-11-360.....13

PETITION FOR WRIT OF CERTIORARI

Brad Goodspeed, Petitioner, respectfully requests that a writ of certiorari issue to review the judgment of the U.S. Court of Appeals for the Ninth Circuit, No. 97-35227.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The original action came before the courts below under 42 U.S.C. sec. 1983. Therefore, the courts below had federal question jurisdiction to decide the original matter under 28 U.S.C. secs. 1331 and 1343(3). This Court has jurisdiction to consider this Petition under 28 U.S.C. sec. 1254.

STATEMENT OF THE CASE

Brad Goodspeed ("Mr. Goodspeed") had been operating a concrete mixing company, PacWest Premix.

Initially, his operation had been located in Idaho. But the lease for his Idaho site was to run out in June of 1992. A new site needed to be found, or the PacWest Premix operation would be forced to shut down. Mr. Goodspeed thought he had secured an appropriate site in Whitman County, Washington, the "Ranninger Site." This location was, however, zoned for agricultural use.

In June of 1991, Mr. Goodspeed filed a re-zone application and environmental checklist with Whitman County. By letter dated July 21, 1991, Whitman County Planner Mark Bordsen ("Mr. Bordsen") informed Mr. Goodspeed that certain technical difficulties, not at issue in this appeal, would prevent Whitman County from making a determination on Mr. Goodspeed's re-zone application without changes to Mr. Goodspeed's pro-

posal. Mr. Goodspeed submitted a second environmental checklist.

Several months later, on November 21, 1991, a "Determination of Non-Significance" ("DNS") was issued by Whitman County. The effect of a DNS under the Washington State Environmental Policy Act ("SEPA"), Wash. Rev. Code § 43.21C *et seq.*, was to relieve Mr. Goodspeed of the need to prepare an environmental impact statement. Subsequently, Whitman County received comments opposing Mr. Goodspeed's development and alleging various reasons why the development should not be allowed to proceed--all of which Mr. Goodspeed denies. However, based solely on these statements and without a factual determination as to their validity, Whitman County decided to hear an "appeal"

on February 26, 1992. Nevertheless, the DNS was upheld by Whitman County on March 2, 1992. But Mr. Goodspeed's fortunes turned for the worse only fifteen day later when, by letter dated March 17, 1992, Mr. Bordsen wrote Mr. Goodspeed giving him notice that Whitman County intended to cancel the zoning change hearing previously set for April 1, 1992. Frustrated by a process he did not understand and out of time, Mr. Goodspeed was unable to go forward with moving the PacWest Premix operation to the Ranniger Site.

Instead, Mr. Goodspeed looked for another site and found a suitable site, the Garret Site. It had the advantage of already having the appropriate zoning, "heavy industrial." On April 27, 1992, Mr. Goodspeed submitted an environmental checklist to Whitman County. On

April 30, 1992, Whitman County issued a DNS. However, once again Whitman County received "public comment" opposing Mr. Goodspeed's proposed development. Regardless, Mr. Bordsen once again upheld the DNS after appeal on May 20, 1992. Cryptically, Mr. Bordsen gave Mr. Goodspeed notice that moving the PacWest facility to this site would be at his (Mr. Goodspeed's) own risk because it might be overturned on appeal. (Whitman County's summary judgment pleadings, Ex. 13 of Aff. of Bordsen at 9.)

As might be expected in the history of Mr. Goodspeed's zoning application, several letters were received by Whitman County. One raised issues concerning the satisfaction of PacWest's water needs. The other alleged

that the proposed site for PacWest was on a 100-year flood plain.

On June 10, 1992, Whitman County decided, based allegedly on Flood Insurance Rate Maps, that one-third to one-half of the Garrett Site was in the 100-year flood plain. Although the maps that Whitman County used had been directly incorporated into its zoning code, it had "apparently" not noticed this problem before. The next day, June 11, 1992, Bordsen contacted Carol King and told her the PacWest building permit would be re-scinded until the "flood plain" issue was resolved.

On June 12, 1992, Mr. Goodspeed discussed the water needs issue with Mr. Bordsen and informed him that he had reached an agreement with a neighboring landowner for use of additional well water that would

allow him to limit use of the well on the Garrett site to supplying office needs.

On June 16, 1992, Whitman County withdrew the DNS, citing Wash. Admin. Code § 197-11-340(3)(a)(iii) and alleging that: (1) Mr. Goodspeed had misrepresented to Whitman County that the property was located in a flood plain; and (2) that Mr. Goodspeed had failed to disclose that the Garrett site lacked adequate water. Mr. Goodspeed denies that he either misrepresented to Whitman County or failed to disclose significant facts on the environmental checklist.

On June 18, 1992, Mr. Goodspeed submitted a survey to Whitman County showing that only 7% of the total Garrett site was within the 100-year flood plain as compared to the one-third to one-half Whitman County

claimed. Mr. Goodspeed then engaged in a process of revising the environmental checklist with Whitman County. Whitman County issued a final environmental checklist for the Garrett site on July 20, 1992. This resulted in the issuance of a "Mitigated Determination of Non-Significance" ("MDNS") by Whitman County on July 21, 1992. Public notice of the MDNS was issued on July 23, 1992. Two environmental groups submitted letters to Whitman County opposing the PacWest development which it rejected in Mr. Bordsen's decision. Whitman County then issued a "Notice of Decision on Comments to Mitigated Determination of Non-Significance" on August 27, 1992.

Both environmental groups appealed on September 11, 1992. On October 5, 1992, Whitman County

held an appeal hearing which was taken by it under advisement by its decision of October 12, 1992. On November 9, 1992, Whitman County affirmed the MDNS, and it supported this decision with findings of fact and conclusions of law on November 16, 1992. However, by this time, Mr. Goodspeed had been forced to remove the PacWest operation from its Idaho lease site, and the repeated delays in obtain permission to build made this victory a hollow one for Mr. Goodspeed.

Mr. Goodspeed initiated suit *pro se* against Whitman County, and other defendants, in two separately filed, but otherwise identical actions filed both in Spokane County Superior Court and the United States District Court for the Eastern District of Washington. He elected ultimately to proceed on the federal action and

dismissed the state action. In his action, he alleged that his rights to substantive and procedural due process had been violated under color of law by Whitman County in that he had first been provide with a DNS (and permission to enter and build on the site) only to have it taken from him. He also alleged that Whitman County had denied him equal protection under the law by discriminating against him. Finally, he also alleged that Whitman County's actions had amounted to a taking in his property rights.

On January 30, 1997, United States District Court for the Eastern District of Washington, the Honorable Robert H. Whaley, presiding, entered an order granting Defendant Whitman County's motion for summary judgment. The district court considered Whitman

County's motions for Dismissal or Other Sanctions for Discovery (Ct. Rec. 48), for Summary Judgment (Ct. Rec. 67), and for Dismissal Based on Insufficiency of Service of Process (Ct. Rec. 80), and Brad Goodspeed's responses during oral argument conducted on January 24, 1997.

ARGUMENT

I. THE CONSTITUTION GUARANTEES MR. GOODSPEED'S RIGHT TO DUE PROCESS IN LAND USE DECISIONS AND HIS SUBSTANTIVE AND PROCEDURAL DUE PROCESS CLAIMS SHOULD HAVE SURVIVED SUMMARY JUDGMENT.

Mr. Goodspeed's substantive and procedural due process claims should have survived summary judgment. Mr. Goodspeed has a protectable property interest that is an element of such claims. A protectable property interest exists when the plaintiff has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law. Wedges/Ledges of California v. City of Phoenix, 24 F.3d 56, 62 (9th Cir. 1994) (citing Board of Regents v. Roth, 408 U.S. 564, 577 (1972)). Because a DNS dispenses with need to file an environmental impact

statement, its issuance by a county usually indicates that the zoning proposal will be approved. See Wash. Admin. Code §§ 197-11-340(1) and 197-11-360. Once a DNS is procured special circumstances, such as establishing that "[t]he DNS was procured by misrepresentation or lack of material disclosure", Wash. Admin. Code § 197-11-340(3)(a)(iii), are necessary before the DNS determination will be reopened and a revised environmental checklist required. The preceding administrative code section is absolutely silent however on how such a determination should be made. The district court speculates that such a determination could be made in a "closed-door review" or by a formal appeal process. Opinion at 4. However, the district court fails to determine whether the "closed-door review" which was in

fact employed against Mr. Goodspeed comports with either substantive or procedural due process, as it must. "The ultimate balance involves a determination as to when, under our constitutional system, judicial-type procedures must be imposed upon administrative action to assure fairness." Mathews v. Eldridge, 424 U.S. 319, 348 (1976). The district court interprets the silence of the administrative code as providing Whitman County with a "green light" to engage in "closed-door review" to determine his property rights, but there are two problems with this analysis that are fatal: (1) it really does not address whether Mr. Goodspeed had a protectable property interest; and (2) assuming, in the light Mr. Goodspeed is entitled to as the non-moving party, that Mr. Goodspeed has a protectable right, it fails utterly to apply the law to

that right. In fact, the district court concedes that "[w]ithdrawal of a DNS may well be a rare occurrence." Opinion at 9. This concession places Mr. Goodspeed in a better factual position than the plaintiff in Wedges/Ledges, who nevertheless was found to have a protectable property interest because of the gaming code's absence of "any open-ended discretionary factors." Wedges/Ledges, 24 F.3d at 62. The administrative code in this case also lacks such "discretionary factors" since a new environmental checklist shall be prepared only if the DNS "was [in fact] procured by misrepresentation or lack of material disclosure." Wash. Admin. Code § 197-11-340(3)(a)(iii). The silence of this provision on what level of due process Mr. Goodspeed is entitled to does not negate his claims, it estab-

lishes them precisely because Whitman County could negate his property rights by factual findings against him to which he has no right to contest. In point of law, the district court's opinion "begs the question" by glossing over whether Mr. Goodspeed got the due process the Constitution guarantees him.

The district court attempts to get around this by finding on the record before it that Mr. Goodspeed had engaged in misrepresentation or material non-disclosure. Opinion at 11. This a factual determination, that the district court attempts to resolve without a trial, deny Mr. Goodspeed his right to a jury trial. A plaintiff defending against a summary judgment motion need only make a showing of a prima facie claim to withstand summary judgment. Celotex Corp. V. Catrett, 477 U.S. 317, 324

(1986). Such a showing consists of designating "facts showing that there is a genuine issue for trial." Id. Mr. Goodspeed denies that he either misrepresented or materially non-disclosed to Whitman County. That places the factual issue in dispute, and should have resulted in summary judgment being denied. And on the legal question, whether Mr. Goodspeed was entitled to more than a "close-door review," the district court utterly failed to apply the appropriate law and determine that when Mr. Goodspeed's right to use property is at stake, something more than an unreviewable secret decision is necessary.

Moreover, both the water issue and the flood plain issue are substantially disputed. The district court concedes as much when it admits that, had Mr. Goodspeed

been provided with a hearing, Mr. Goodspeed would have been able to present evidence establishing that the PacWest plant would not have occupied any of the 7% of the land that was in the 100-year flood plain. Opinion at 12. Mr Goodspeed responded to the question asking if the **proposal** lay within the 100 year flood plain and it was the proposed construction of the cement silo and associated air quality permit that triggered the SEPA process and the succesfull completion of the SEPA process becomes the "issuance" of the air quality permit. Had they wanted to know if the "Property" or "Land" lay withinin the the 100 year flood plain, one would assume they would ask the question implementing that language. And it was never Mr. Goodspeed's contention that the well on the Garrett property was going to be the sole

source of his water for the PacWest operation, similar applications have been afforded the oportunity the haul in the water by truck for batching purposes. The original application was for a "temporary" batch plant and it was by only the "assumption" of the planning department that it was processed as a permanant application. However, by conducting "closed-door review," Mr. Goodspeed was denied any reasonable, timely opportunity to avoid this crucial finding against him--effecting a taking of Mr. Goodspeed's otherwise reasonable right to engage in business and use property.

I I. THE CONSTITUTION PROTECTS MR. GOODSPEED'S RIGHT TO REASONABLE, CONSISTANT, AND FAIR LAND USE DECISIONS SUCH THAT HIS EQUAL PROTECTION CLAIM SHOULD HAVE SURVIVED SUMMARY JUDGMENT.

The district court improperly dismissed Mr. Goodspeed's equal protection claim because it once again took the place of a jury and decided the factual issues. The district court attacked Mr. Goodspeed's equal protection claim by alleging that he had neither direct nor indirect evidence of discriminatory intent. Opinion at 12-13. Against this, Mr. Goodspeed presents the circumstances that each time he was close to approval such that he could start work, Whitman County changed the rules and prevented him from doing so. Mr. Goodspeed also presents his allegation that a County Commissioner told him he would never get the Ranniger Site re-zoned. On these disputed facts, summary judgment was improperly granted.

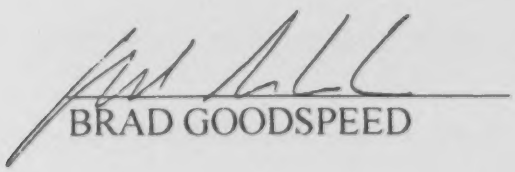
Moreover, such activity by the County represents the very worst of land use planning and regulation. If land use planning and regulation are to provide business land users reasonable due process and reasonable use of County land, the law must restrain the County from engaging in the tactics it engaged in here. The Constitution demands no less--vaulting property rights to a high and proper place in a free society.

CONCLUSION

For all the above reasons, the district court's dismissal of Mr. Goodspeed's claims on the basis of summary judgment should be reversed and his matter remanded for trial.

Respectfully submitted,

DATED: April 1, 1999



BRAD GOODSPEED

APPENDIX

I. OPINIONS BELOW:

A1 TO A14: District Courts ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT, *I NTER ALIA* No. CS-95-229-RHW (entered January 31, 1997)

A15 TO A16: Ninth Circuit Court of Appeals MEMORANDUM AFFIRMING DISTRICT COURTS ORDER, No.97-35227 (entered September 18, 1998)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

BRAD M. GOODSPEED, *et al.*,	)	
Plaintiffs,	)	NO. CS-95-229-RHW
v.	)	
WHITMAN COUNTY,	)	**ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT,**
Defendant.	)	***INTER ALIA***

Before the Court are Defendant's Motions for Dismissal or Other Sanctions for Discovery (Ct. Rec. 48), for Summary Judgment (Ct. Rec. 67), and for Dismissal Based on Insufficiency of Service of Process (Ct. Rec. 80). These motions were heard with oral argument on January 24, 1997. Plaintiff appeared and was represented by Chris Johnson. Defendant was represented by Guy Nelson.

1. DEFENDANT'S MOTION FOR DISMISSAL OR OTHER SANCTIONS FOR DISCOVERY

Defendant seeks dismissal of this action because, in filing the original Complaint, Plaintiff did not properly effect service when he served each member of the Whitman County Board of Commissioners ("the Board") at a regular meeting. Defendant contends that this was insufficient because it did not include service on either the county auditor

or the county sheriff, as required by Fed. R. Civ. P. 4(j)(2) and Wash. Rev. Code 4.28.080(l), 36.28.010. Although Plaintiff does not dispute the fact that service of the original Complaint was not executed on the county auditor or sheriff, Defendant's motion must fail. So long as there has been "substantial compliance with Rule 4 of the Federal Rules of Civil Procedure, "a general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982) (citation omitted); Fed. R.Civ. P. 12(h)(1) (insufficiency of process waived if it is omitted from a motion under Rule12, a responsive pleading, or an amendment thereof under Fed. R. Civ. P. 15(a)). "An appearance ordinarily is an overt act by which the party comes into court and submits to the jurisdiction of the court. This is an affirmative act involving knowledge of the suit and an intention to appear." *Benny v. Pipes*, 709 F.2d 489, 492 (1986), *as amended*, 807 F.2d 1514 (9th Cir. 1987), *cert. denied*, 484 U.S. 870 (1987).

Although Defendant's Answer, filed on June 20, 1996 (Ct. Rec. 31), and Amended Answer, filed on September 20, 1996 (Ct. Rec. 47), both preserve this issue, before filing any responsive pleading, Defendant filed two Notices of Appearance (Ct.Recs. 3 & 7), neither of which preserves this issue. As such, insufficiency of process was probably waived prior to service of the Answer. Moreover, prior to filing the original Answer, Defendant appeared at several status conferences (August 23, 1995, November 2, 1995, and May 29, 1996), filed status certificates and supplements thereto (September 18, 1995 and October 30, 1995), initial disclosures (September 25, 1995), contested withdrawal of Plaintiff's attorney (April 22, 1996), and filed a motion to compel discovery (May 20, 1996). Further, following the filing of the Answer, but prior to moving for dismissal for insufficiency of process on December 2, 1996, Defendant filed and vigorously pursued several motions regarding pretrial discovery (July 15, 1996,October 11,1996, and October 26, 1996 (renoting previous motion)), some of which included requests to dismiss this action.

The Court denies Defendant's motion in light the sufficiency of Plaintiff's service of the Amended Complaint, as well as Defendant's

clear demonstration of an intention to defend this suit, its actual knowledge of the Plaintiffs' claims, and its failure to demonstrate prejudice.

2. DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant seeks judgment as a matter of law on Plaintiff's three claims under 42 U.S.C. 1983 for denial of equal protection of the laws and denial of property without substantive and procedural due process.

a. Background

i. Washington State Environmental Policy Act

This case involves application of the Washington State Enviromental Policy Act ("SEPA"), Wash. Rev. Code 43.21C *et seq.* The SEPA process begins with submission of an environmental checklist, which is initially reviewed by the lead agency. Wash. Admin. Code 197-11 - 100; 197-011-960. The agency may require the applicant to submit more information, undertake its own study, or consult with other agencies regarding the environmental impact of the proposal. *Id*; Wash. Admin. Code 197-11-335. Based on the environmental checklist and other information, a threshold determination is made and memorialized as either a determination of significance, which requires a further environmental impact statement, or as a determination of non-significance ("DNS"). Wash. Admin. Code 197-11-310, 197-11-340(l). A DNS dispenses with the necessity of preparing an environmental impact statement and may be issued only if the responsible official determines that there will be "no probable significant adverse environmental impact" from a proposal. Wash. Admin. Code 197-11-340(l),197-11-360. Until such time as the threshold determination is made, the applicant may revise or clarify any information in the environmental checklist. Wash. Admin. Code 197-11-100(2). Thereafter, regulations provide that the applicant may make revisions only by means of the commenting procedures outlined in Wash. Admin. Code 197-11-340 & 197-11-360. In accordance with these provisions, public notice of

a threshold determination must be given by publication in a newspaper of general circulation. Wash. Admin. Code 197-11-5 10. Pursuant to Wash. Admin. Code 197-11-340(l), the lead agency could not act upon the proposal for fifteen days after the issuance of the DNS, during which time any person or agency could comment. Thereafter,

> [t]he responsible official shall reconsider the DNS based on timely comments and may retain or modify the DNS or, if the responsible official determines that significant adverse impacts are likely, withdraw the DNS....

Wash. Admin. Code 197-11-340(2)(f). Further, Wash. Admin. Code 197-11-340 provides an alternate means for withdrawal of a DNS. It mandates that the lead agency withdraw a DNS if.

> (iii) **The DNS was procured by misrepresentation or lack of material disclosure**; if such DNS resulted from the actions of an applicant, a subsequent environmental checklist on the proposal shall be prepared directly by the lead agency or its consultant at the expense of the applicant.

Wash. Admin. Code 197-11-340(3)(a)(iii) (emphasis added). This provision does not, however, indicate the procedural mechanism by means of which such a decision would be made. Conceivably, such a decision could be reached by means of a closed-door review conducted in much the same way as the reconsideration process undertaken by the responsible official, or such a decision could be reached by means of the appeals process, in accordance with Whitman County Ordinance 9.04.080(C). Appeals must be heard at "a regular meeting" of the Board, the date for which shall be set by the chairman of the Board, within 30 days of the filing of the letter of appeal. Whitman County Ordinance 9.04.080(C) (1979). At least ten days prior to such a meeting, the county auditor must mail notice thereof to the appellant, at the appellant's last known address or to the address stated in the letter of appeal.

ii. Facts

Plaintiff's claims revolve mainly around the allegedly unconstitutional delay he suffered in attempting to relocate his concrete mixing company, PacWest Premix, when its lease ran out in June, 1992. Initially, Plaintiff secured the Ranninger Site, which was zoned only for agricultural use. In June 1991, Plaintiff filed a re-zone application and an environmental checklist. By letter dated July 12, 1991, County Planner Mark Bordsen ("Bordsen") informed Plaintiff that, due to issues not relevant here, no determination would be made regarding Plaintiff's property unless Plaintiff changed or clarified his proposal. Accordingly, Plaintiff submitted a second environmental checklist.

On November 21, 1991, a DNS was issued and published, thus relieving Plaintiff of the requirement of preparing an environmental impact statement. During the fifteen day comment period, comments were received that were treated as appeals and were heard by the Board on February 26, 1992. Following this, the Board upheld the DNS on March 2, 1992. Subsequently, by letter dated Ma rch 17,1992. Bordsen wrote to Goodspeed canceling a zone change hearing set for April 1 1992, for reasons not relevant to this opinion. Thereafter, no further action was taken by either party. Plaintiff explains that he elected not to pursue building on the Ranninger Site because he was discouraged by the process and did not believe that he would obtain a zone change based, in part, on comments made by unidentified persons indicating that one of the commissioners had so indicated.

Plaintiff then sought and found the Garrett Site, which was already zoned "heavy industrial" and did not need to be re-zoned for Plaintiff's business. On April 27,1992, Plaintiff submitted an environmental checklist for this site, and on April 30, 1992 a DNS was issued. The 15 day comment period ended on May 15, 1992, before which several comments were received from the public. After considering these comments, County Planner Bordsen upheld the issuance of the DNS on May 20, 1992. Plaintiff was so informed by means of a letter from Bordsen, which also stated:

> This completesthe SEPA process for the temporary Pac West PreMix Inc., Concrete Plant project. However, there is a fifteen day appeal period allowed by the.County's

> SEPA Ordinance. We expect that all parties will have received this notification and decision by Tuesday, May 26 1992 and have therefore set the end of this appeal period for June 10, 1992. **This decision allows the applicant to proceed with the permit applications as needed at the applicant's own risk that the decision could be appealed and overturned.**

Exhibit 13 to Affidavit of Mark Bordsen, p. 9 (emphasis in original).

Prior to expiration of the appeal deadline, several letters were received, alerting Defendant to, among other things, two issues of concern. One was from Mr. and Mrs. Wendt, indicating that their adjacent residence obtained water from a well located on the Garrett Site. They expressed concerns regarding the adequacy and purity of the water supply if used by Plaintiff in the manner suggested by the environmental checklist. Plaintiff"s April 27, 1992 environmental checklist failed to indicate the source of the water that would be used by the plant. Specifically, the environmental checklist asks, "Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known." In response, Plaintiff stated, "Our present usage as indicated by meters is 4,000 gallons per day. May to October." Exhibit 10 to Affidavit of Marc Bordsen, Environmental Checklist, p. 3. Plaintiff does not dispute the fact that this well was intended to provide water for his plant and for the Wendt's residence. He states, however, that he thought this was not significant as there was an off-site well he planned to use for production needs, leaving the shared well to be used for domestic and office needs.

Another letter raised concerns that Plaintiff intended to construct on a 100 year flood plain despite Plaintiff s statement to the contrary in the environmental checklist. Specifically, the environmental checklist asked, "Does the proposal lie within a 100-year floodplain? If so, note location on the site plan," to which Plaintiff responded "No." Exhibit 10, Enviromental Checklist 5, p. 3.

According to the Affidavit of Mark Bordsen, on June 10, 1992, Bordsen asked an employee of the Department of Public Works to

prepare a drawing, which indicated that one-third to one-half of the site was located within the flood plain. The boundaries were determined using the Flood Insurance Rate Maps, which were adopted by and incorporated into the Whitman County Zoning Ordinance. The following day, on June 11, 1992, Bordsen spoke with Carol King, the contact person listed on the environmental checklist. Bordsen explained that the building permit would be rescinded until the flood plain issue was resolved, which could be done by proving that the location was not within the flood plain, obtaining a variance, or siting the structure beyond the flood plain. He also explained that it had come to his attention that the well was subject to an agreement for water usage by the Wendts, which had not been disclosed in the Environmental checklist and could harm the neighbor. On June 12,1992, Bordsen and Goodspeed spoke, Goodspeed telling Bordsen that he had made an agreement with an adjoining land owner for use of their well and explaining that the water from the well would be used only for office purposes. Bordsen explained to Goodspeed that the flood plain issue would need to be addressed in one of the three ways he had described to Carol King.

Thereafter, by means of an order issued June 16, 1992, the Board withdrew the DNS, citing Wash. Admin. Code 197-11 340(3)(a)(iii) and stating:

> (C) In its Environmental Checklist, Pac-West misrepresented the fact that the parcel in question was located or partially located within a flood plain.
>
> (D) In its Environmental Checklist, Pac-west failed to disclose that the on-site well was shared by an adjacent resident that the well's capacity was not sufficient to accommodate Pac-West's potential water quantity use, and/or that there is a high potential for complete drainage of the on-site well, all of which either together or singularly are material to an investigation of the environmental impact of Pac-West's proposal.

Exhibit 19 to Affidavit of Mark Bordsen, In re: *Brad Goodspeed, d/b/a Pac- West Pre-Mix*, p. 3.

Following the revocation of the DNS, on June 18, 1992, Plaintiff submitted a survey indicating that 7% of the total Garrett Site was within the flood plain, an area smaller than that demonstrated by the flood insurance rate maps. On July 6, 1992, Bordsen sent Plaintiff a draft environmental checklist for comment. After a subsequent revision, Goodspeed accepted issuance of a Mitigated Determination of Non-Significance ("MDNS"). On July 20, 1992, Bordsen issued a final environmental checklist for the Garrett Site, and on the following day, he issued the MDNS.

Notice of the issuance of the MDNS was published on July 23, 1992. Prior to expiration of the comment period, Defendant received a letter from Friends of the Corridor and Palouse-Clearwater Environmental Institute. By means of a memorandum, Bordsen rejected the comments of these groups, and subsequently on August 27, 1992,a Notice of Decision on Comments to Mitigated Deteri-nination of Non-significance was published. On September 11, 1992, both groups filed appeals. A hearing was held within thirty days on October 5, 1992 and the appeals were taken under advisement by means of a decision issued on October 12, 1992. The Board concluded that it needed to await development of additional information by county staff based on receipt of a letter from the lessor of Plaintiff's Moscow plant site, alleging that Plaintiff had not properly cleaned the site. It indicated that such information would likely be available by October 14 or 15, 1992. On November 9, 1992, the Board issued a decision affirming the MDNS and on November 16, 1992, it entered findings of fact and conclusions of law in support of that decision.

b. Substantive and procedural due process claims

Plaintiff's substantive and procedural due process claims both fail because Plaintiff has not made the threshold showing of a protectable property interest, which is a prerequisite to bringing such claims. *Wedges\Ledges of Cal. v. City of Phoenix*, 24 F.3d 56 (9th Cir. 1994) (citing *Board ofRegents v. Roth*, 408 U.S. 564, 569 (1972)); *see also Zahra v. Town of Southold*, 48 F.3d 674 (2d Cir. 1995) (using traditional entitlement analysis to examine substantive due process claim arising from revocation of building permit). A protectable property interest is

present where an individual has a reasonable expectation of entitlement deriving from existing rules or understandings that stem from an independent source such as state law. *WedgeslLedges*, 24 F.3d at 62(citations omitted).

Plaintiff claims a protectable property interest in the DNS, arising from his reasonable expectations that (1) a withdrawal of a DNS would be extremely.rare, (2) an appeal of the DNS for the Garrett Site would permit him the opportunity to be heard, in accordance with local ordinances, and (3) there existed a strong likelihood that he would obtain the DNS.

Withdrawal of a DNS may well be a rare occurrence. Nevertheless, such a subjective expectancy, without more, creates no constitutionally protected interest. *Perry v. Sinderman*, 408 U.S. 593, 601-2 (1972).

Nor is such an interest created by Plaintiff's expectation that this case would be treated as an appeal. As stated, Wash. Admin. Code 197-11-340(3)(a) requires the lead agency to withdraw a DNS if it was procured by misrepresentations or material non-disclosures. As Plaintiff conceded at oral argument, there is nothing in SEPA or any of the regulations cited that requires this to be treated as an appeal. Without such a provision or a demonstration that the County had limited itself by means of an ordinance or otherwise to considering withdrawal of a DNS only in the context of an appeal, Plaintiff's argument that he was entitled to a hearing appears to fail.

Plaintiff appears also to argue that he had a property interest in the appeal procedure itself. Whether a property interest can arise from this procedural mechanism, alone, depends upon whether and to what extent the statute contains mandatory language that restricts the discretion of the relevant agency to revoke a DNS. *Jacobson v. Hanniflin*, 627 F.2d 177, 180 (9th Cir. 1980). Here, withdrawal of a DNS became mandatory if the lead agency found that it had been procured by misrepresentation or lack of material disclosure. Wash. Admin. Code 197-11-340(3)(a)(iii). No statute requires that the decision of the lead agency regarding misrepresentations and non-disclosures be made only by means of an

appeal. As such, no protectable property interest can exist in the actual appeal process itself.

Plaintiff's final argument also fails. Plaintiff claims that a property interest in the DNS arose because he was significantly likely to receive and maintain the DNS. Using the test adopted in *Yale Auto Parts, Inc. v. Johnson*, 758 F.2d 54, 59 (2d Cir. 1985) (no property interest where plaintiff's application might properly have been denied by the Zoning Board of Appeals),

> the question of whether an applicant has a legitimate claim of entitlement to the issuance of a license or certificate should depend on whether, absent the alleged denial of due process, there is either a certainty or a very strong likelihood that the application would have been granted. Otherwise the application would amount to a mere unilateral expectancy not rising to the level of a property right guaranteed against deprivation by the Fourteenth Amendment.

Id. at 59. *See also Tyson v. City of Sunnyvale*, 920 F. Supp. 1054, 1061 (N.D. Cal.1996) (applying *Yale Auto Parts* test to landowners' challenge to municipality's rejection of their re-zoning application).

Two issues were raised as the basis for revoking the DNS: the well and the flood plain. Although these two issues were ultimately resolved to the satisfaction of the Board such that it was willing to affirm a mitigated DNS, the Board appears to have been fully justified in concluding that there had been misrepresentations or non-disclosures. First, as regards the well, following expiration of the comment period, Plaintiff spoke with Bordsen and explained how, in fact, the plant was going to use water - i.e., by using a neighboring well for the plant's operations and the shared well for office and building domestic uses. This does not, however, change the fact that Plaintiff's April 27, 1992 environmental checklist failed to indicate the source of the water that would be used by the plant. The environmental checklist had asked, "Will ground water be withdrawn, or will water be discharged to ground water? Give general description, purpose, and approximate quantities if known." In response, Plaintiff stated:

> Our present usage as indicated by meters is 4,000 gallons per day.May to October.

Exhibit 10 to Affidavit of Marc Bordsen, Environmental Checklist, p. 3. The Board found that Plaintiff had failed to disclose the source of the water to be used, but not that he made any misrepresentations in this regard. A plain reading of Plaintiff's environmental checklist reveals that this is true.

As to the flood plain issue, the Board found Plaintiff had misrepresented (but not failed to disclose) that part of his site was within the flood plain. The Environmental checklist had asked, "Does the proposal lie within a 100-year floodplain? If so, note location on the site plan," to which Plaintiff had responded "No." Exhibit 10, Environmental Checklist ¤ 5, p. 3. Both the evidence before the Board at that time and the evidence later presented by Plaintiff indicate that some portion of Plaintiff s site was in the flood plain, though they differ in their calculations as to what amount. As such, the Board's conclusion that Plaintiff had made a misrepresentation in his application is accurate. Admittedly, had a hearing been held, Plaintiff might have presented his view that the proposal was not within the flood plain area because the land therein was not going to actually be used in the plant's operations. Although Plaintiff was later granted a mitigated DNS, at the time of submission of his original DNS, he did not have a reasonable expectation of preventing revocation of the DNS. Accordingly, there was no protectable property interest therein. Without a protectable property interest, Plaintiff cannot pursue a substantive or procedural due process claim under 42 U.S.C. 1983 and summary judgment is granted on these claims.

c. Equal Protection

The Amended Complaint alleges that Defendant deprived Plaintiff of his rights under the Equal Protection Clause. Liability for a violation of Plaintiff s Equal Protection rights would depend on his ability to prove that (1) he, as compared with others similarly situated, was selectively

treated; and (2) that such selective treatment was based on impermissible considerations such as race, religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure him. *LeClair v. Saunders*, 627 F.2d 606, 609 (2d Cir. 1980).

Although discriminatory intent may be proved by direct or indirect evidence, *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977); *Federal Deposit Ins. Corp. v. Henderson*, 940 F.2d 465, 471 (9th Cir. 1991),

Plaintiff's Equal Protection Claim must fail because he has done neither. The only evidence of any so-called bad faith can be found in the failure to strictly define and maintain a withdrawal procedure and the comments Plaintiff alleges were made by unidentified County Commissioners indicating that he would never get the Ranninger Site re-zoned. Although he asks the Court to infer malicious intent, there is too little evidence indicating that Plaintiff s DNS was dealt with in a manner reflecting bad faith on the part of Whitman County officials to raise a question of fact to contradict the presumption of honesty and integrity on the part of decision-makers. *See Tyson*, 920 F. Supp. at 1061 (citing *Stivers v. Pierce*, 71 F.2d 732, 741 (9th Cir. 1995)).

d. Takings

Defendant argues, and Plaintiff concedes, that the Fifth Amendment takings claim is unripe as Plaintiff has not sought compensation through the State's procedures before turning to this tribunal for redress. *Williamson County Regional Planning Comm'n v.Hamilton Bank*, 473 U.S. 172,194-95 (1985). Accordingly, this claim is dismissed.

Accordingly, IT IS HEREBY ORDERED:

1. Defendant's Motion for Summary Judgment (**Ct. Rec. 67**) is **GRANTED.**

2. Defendant's Motion for Dismissal or Other Sanctions for Discovery (**Ct. Rec.48**) is **DENIED as moot.**

3. Defendant's Motion for Dismissal Based on Insufficiency of Service of Process (**Ct. Rec. 80**) is **DENIED.**

IT IS SO ORDERED. The Clerk is directed to enter this order and to provide copies to counsel.

DATED this 30 day of January, 1997.

/S/

ROBERT H. WHALEY
United States District Court

Q:\C1VIL.95\G00DSPEE.SJ

Note- Above order filed January 31, 1997 by James Larsen, Clerk

THIS PAGE LEFT BLANK INTENTIONALLY

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRAD M. GOODSPEED, dba Pacwest Premix Inc.; PACWEST PREMIX,

Plaintiffs-Appellants,

v.

WHITMAN COUNTY,

Defendant-Appellee.

No. 97-35227
D.C. No. CV-95-00229-RHW

MEMORANDUM*

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, District Judge, Presiding

Submitted September 14, 1998**

Before: O'SCANNLAIN, FERNANDEZ and TASHIMA, Circuit Judges.

Brad M. Goodspeed appeals pro se the district court's entry of summary judgment against him in his 42 U.S.C. 1983 lawsuit alleging

violations of the Fourteenth Amendment. We have jurisdiction pursuant to 28 U.S.C. 1291, and we affirm.

This court reviews de novo the district court's grant of summary judgment. *See Wedges/Ledges of California v. City of Phoenix*, 24 F.3d 56, 61 (9th Cir. 1994). We agree with the district court: Goodspeed's substantive and procedural due process claims fail because he has not shown a protected property interest under state law, see id. at 62, and his equal protection claim fails because there is no evidence that Goodspeed was treated differently from others similarly situated, *see Kawaoka v. City of Arroyo Grande*, 17 F.3d 1227, 1240 (9th Cir 1994).

AFFIRMED.

*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as may be provided by 9th Cir. R. 36-3.

**The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a); 9th Cir. R. 34-4.

The Above Memorandum was filed September 18, 1998 by Cathy A. Catterson, clerk U. S. Court of Appeals for the Ninth Circuit.